Supreme Court, U.S.
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86-2013

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

LAURA J. WHITEHORN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

I.

When officers discover evidence during an illegal search, later obtain a warrant based upon an affidavit that includes reference to their observations during the illegal search, "search" the premises again and remove what they previously found, must such evidence be suppressed as numerous Courts have held, or does the inevitable discovery doctrine create an exception to the exclusionary rule in such circumstances, as the Fourth Circuit held in this case?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

OPINION BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED 2

STATEMENT 3

A. The Three Searches of the Apartment 5
B. The Opinion of the District Court 18
C. The Opinion of the Court of Appeals 21

REASONS FOR GRANTING THE WRIT 22

CONCLUSION 30

APPENDIX A . . . . . App 1

APPENDIX B . . . . . App 3

TABLE OF AUTHORITIES

Payton v. New York,
445 U.S. 573 (1980) 8

Salgado v. United States,
807 F.2d 603 (7th Cir. 1986),
cert. pending, __U.S.__, No.
86-1386 (1987). 24

Silvestri v. United States,
787 F.2d 736 (1st Cir. 1986),
cert. pending, __U.S.__ No.
86-678 (1987) 24

Steagold v. United States,
451 U.S. 204 (1981) 8

U.S. v. Buck, 813 F.2d 588
(2d Cir. 1987). 5

U.S. v. Buck, 609 F.Supp. 713
(S.D.N.Y. 1986) 5

U.S. v. Evans, 629 F.Supp.
1544 (D.Conn. 1986) 5

United States v. Merriweather,
777 F.2d 503 (9th Cir. 1985)
cert. denied, 106 S.Ct. 1497
(1986). 20, 25

United States v. Moscatiello,
771 F.2d 589 (1st Cir. 1985),
vacated sub. nom. Carter v.
United States, __U.S.__, 106
S.Ct. 2241 (1986); on remand,
803 F.2d 20 (1st Cir. 1986),
cert. granted, sub. nom.,
United States v. Murray,
__U.S.__, No. 86-995 (1987) . . . passium

TABLE OF AUTHORITIES
(continued)

United States v. Whitehorn,
813 F.2d 646 (4th Cir. 1987) . . . passium

U.S. v. Whitehorn, 652 F.Supp.
395 (S.D.N.Y. 1987). 3, 23

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

OPINIONS BELOW

The opinion of the court of appeals (App. 3) is reported at 813 F.2d 646. The opinion of the district court was issued

from the bench and is not officially reported. (J.A. 245-260).[1]

JURISDICTION

The judgement of the court of appeals was entered on March 12, 1987. On April 13, 1987, the court of appeals denied petitioner's timely petition for rehearing. (App. 1-2). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or

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1 "J.A." refers to the Joint Appendix in the court of appeals.

things to be seized.

STATEMENT

Petitioner, Laura J. Whitehorn was named in a five count indictment charging possession of a false document-making implement, possession in excess of five false identification documents, assault on a federal officer, and possession of an unregistered firearm and silencer.[2]

Prior to trial, Ms. Whitehorn moved to suppress evidence found in an apartment in Baltimore, Maryland, during three separate searches of the apartment, two without a warrant, on May 11, 1985. At first, based upon the voluminous written submissions

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[2] Petitioner Whitehorn was also indicted in New York and charged with making a false statement in an application for a passport. The identical suppression issue was raised in New York. The district court's decision is reported in United States v. Whitehorn, 652 F. Supp. 395 (S.D.N.Y. 1987).

and proffers by the parties, and despite petitioner's repeated and unwaivering requests for an evidentiary hearing, the district court denied the suppression motion, except for one item, an Uzi. Prior to trial, a hearing was held where the court further explained its suppression ruling, explaining that if other evidentiary items were found in the same manner as the Uzi, these items likewise fell within the court's suppression ruling. At trial, it became immediately clear to the court that other items were being referred to that did fall within the court's ruling and, therefore, a mistrial was ordered.

The following day, the district court finally held an evidentiary hearing, after which the court expanded its suppression ruling to numerous other items.

The United States appealed both suppression Orders, which were later reversed by the court of appeals for the Fourth Circuit.

A. THE THREE SEARCHES OF THE APARTMENT

1. The First Warrantless Search

On the morning of May 11, 1985, FBI agents arrested Ms. Marilyn Buck and Ms. Linda Sue Evans[3] in New York, having following them from Baltimore, Maryland.

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[3] Ms. Marilyn Buck was sought by the FBI for an "escape" from prison in West Virginia and for alleged participation in an incident in Nyack, New York. Reported cases involving Ms. Buck can be found in United States v. Buck, 813 F.2d 588 (2d Cir. 1987); United States v. Buck, 609 F.Supp. 713 (S.D.N.Y. 1986).

Ms. Linda Sue Evans was sought federally in Connecticut for allegedly harboring Marilyn Buck, although her indictment was sealed at the time of her arrest. See United States v. Evans, 629 F. Supp. 1544 (D. Conn. 1986). These charges were later dismissed. The identical suppression issue raised in this Petition was decided in that case as well.

Shortly thereafter, three other FBI agents arrived at the Yorkewood Apartment complex in Baltimore and began interviewing management personnel about Ms. Buck and Ms. Evans, and their associates. The agents then obtained a pass key to apartment D, building 5714, and proceeded there to interview neighbors.[4]

Agents Tom Moore and Roger Kuhleman first interviewed the resident of apartment B, Mr. Henry, while agent Garrett stood on the second floor landing outside of apartments C and D. Soon, up to eight other armed agents arrived and

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4 The Yorkewood Apartments are garden apartments. Building 5714 contains four two-bedroom apartments. Apartments A and B are on the first floor and apartments C and D are directly above A and B on the second floor. Moreover, building 5714 does not stand alone and is attached to other units, although these other units have separate entrances. (J.A. 306-307).

stationed themselves outside the building. After finishing with Mr. Henry, the agents briefly interviewed Ms. Glass, a resident in apartment A. During this interview, the agents learned that Ms. Glass lived in the apartment with her invalid mother, who was also present.

While interviewing Ms. Glass, agent Garrett reported to agent Moore that he had observed feet in apartment D through the space between the floor and the bottom of the door.

Agents Moore and Kuhleman then went to their vehicles and retrieved protective clothing and weapons. Agent Moore testified that upon reentering the building, he approached apartment D, knocked on the door and received an answer from a female. Moore told her he was with the FBI and she should open the door. The

female asked what he wanted. Moore claimed that he had an arrest warrant for Dr. Alan Berkman.[5] The female said she would not open the door. Moore then told her that if she did not open it, he would break it down. She again said she would not open the door. Moore claimed that he then heard the rustling and ripping of papers near the door so he tried the pass key, to no avail. The door was then knocked down and the three armed agents entered.[6]

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[5] Dr. Alan Berkman was sought by the F.B.I for allegedly aiding and abetting Ms. Buck after the incident in Nyack, New York. He was apprehended on May 23, 1985, in Pennsylvania.

[6] Below, petitioner was denied an evidentiary hearing regarding the propriety of the FBI agents entry into the apartment to arrest Dr. Berkman, a non-resident of the apartment, in light of the fact that the agents lacked a search warrant. Compare: Payton v. New York, 445 U.S. 573 (1980), and Steagold v. United States, 451 U.S. 204 (1981).

A female was immediately located near the living room area. Her identity was unknown to the agents. She was nevertheless immediately knocked down and handcuffed. While agent Moore held her down on the floor, agents Garrett and Kuhleman went room to room through the apartment allegedly to see if anyone else was there. No one was observed, and no items of evidentiary value were discovered during this first warrantless search. (J.A. 274).

Ms. Whitehorn was removed from the apartment building. On the way to FBI headquarters, Ms. Whitehorn allegedly kicked one of the FBI agents in the shin, which gave rise to the assault charge, the only charge pending when she was later given her Rule 5 hearing by Magistrate Rosenberg who detained her without bond.

After Ms. Whitehorn's removal from the apartment, agents Garrett and Kuhleman, joined by agent Tom Moore, finished their so-called "security check" and left the apartment. This search had taken 4 to 5 minutes to complete. Agent Garrett was then posted just outside the front door of the apartment. Agents Moore and Kuhleman returned to their vehicle and radioed headquarters.

2. **The Second Warrantless Search**

According to agent Kuhleman, after the initial search of the apartment, agent Moore radioed F.B.I. headquarters and informed them that:

> We had entered the apartment, that we had effected an arrest on a young lady who did not identify herself, we did not know who she was. And said that -- requested that a search warrant be prepared for the apartment. (sic). (J.A. 331).

Moore also allegedly told headquarters

that he thought there was a possibility there may be explosives in the apartment, and he requested assistance to find out. Moore claimed that he believed there was a possibility that prior to her arrest, Ms. Whitehorn had time to set an explosive somewhere in the apartment. (J.A. 292).

Forty-five minutes later, agent Ken Moore arrived to search apartment D. During these intervening 45 minutes nothing was done to evacuate the area, to inform the neighbors in building 5714 and the adjacent buildings of the "suspected bomb," to make plans for evacuation, to secure the assistance of any utility companies, the fire department, medical personnel, or even the management of the Yorkewood apartments. Instead, most of the agents waited just outside the building, agent Garrett stayed inside the

apartment building on the stairs, and the neighbors remained in the buildings, ignorant of the so-called "imminent danger" to their well-being, including, at least, Ms. Glass and her invalid mother.

Once agent Ken Moore arrived, the situation did not change at all except that instead of remaining on the stairs, agent Garrett went inside the apartment with agent Ken Moore, while some of the other agents went to lunch. The neighbors remained inside their apartments and uninformed of the so-called "imminent danger", the gas and electricity remained on, the fire department unnotified, and no bomb disposal unit was called. While this second search was described in the search warrant affidavit as a "cursory search," it in fact extended to every room, every closet, every suitcase, and every envelope

inside the apartment[7], and it took nearly two hours.

Once they were finished with searching the apartment itself, the agents walked down two flights of stairs into the basement, where they proceeded to break off the lock on storage bin D. They then thoroughly searched the storage bin, finding additional items immediately recognized as having potential evidentiary value. The one thing absolutely not found anywhere was any explosives.

During the course of this search, agent Garrett remained in radio

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[7] During their comprehensive search, the agents found and recognized the evidentiary value of, at least, the following: (1) weapons, including: an Uzi, a 38, a .22, a silencer and holsters; (2) assorted "timing devices" clocks and the like; (3) a laminating photographic machine; (4) false identification cards, including: social security cards, drivers licenses, library cards, and passports; (5) cash; (6) wigs; (7) manuals and (8) keys.

communication with his supervisors at headquarters, "all the time" (J.A. 459, 471), dutifully reporting the discovery of every item of evidentiary worth. (J.A. 468-469). Receiving these reports were F.B.I. Agent Foley, Agent Major[8] and the magistrate who later signed the search warrant. (J.A. 469).

After the completion of this search, Garrett had discussions with other agents, informing them that no explosives were in the apartment and that other items, such as an Uzi,[9] a silencer and other weapons and timing devices, had been found. He told them about all "items of evidentiary

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[8] Agent Major later wrote and swore to the search warrant affidavit in this case. (J.A 33).

[9] The Uzi was found in its original box, in a paper bag on the top of a shelf, in a closet in a back bedroom. Agent Major claimed in the affidavit that it was found in "plain view." (J.A 33).

worth." (J.A. 468-469).

3. The Third Search: By Warrant

At around 5:00 p.m., Magistrate Rosenberg held a Rule 5 hearing at FBI headquarters for Ms. Whitehorn, detaining her without bond pending a detention hearing based upon a request by the FBI agents. Magistrate Rosenberg had been at FBI headquarters with agents Major and Foley since early afternoon. After the Rule 5 hearing, Magistrate Rosenberg was presented with Agent Major's affidavit seeking a search warrant.

Included in the affidavit were the following factual claims:

1. that a cursory protective sweep was made of apartment D, and that during this protective sweep, an Uzi submachine gun was observed in plain view, (J.A 33), (emphasis added);

2. that there is hidden in the apartment or storage area located in the basement of said building

stolen explosive materials. . ., (J.A 32) (emphasis added);

3. that this storage facility is identified with the letter D located in the picket wooden front of the facility and had a padlock on it, (J.A. 31) (emphasis added).

Magistrate Rosenberg granted the agents the broad authority to conduct a search for:

> False identities of federal fugitives; telephone numbers and addresses of federal fugitives; location of other safe houses; evidence of harboring, relating to Allan Berkman, Mutula Shakur, Cheri Laverne Dalton, Laura J. Whitehorn [Linda Sue Evans and Marilyn Jean Buck][10]; and all

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[10] Linda Sue Evans and Marilyn Jean Buck's names were hand printed into the warrant and the affidavit by the magistrate, not by the affiant. Mutula Shakur and Cheri Laverne Dalton were mentioned in paragraph 36 only (J.A. 32), which reads in its entirety as follows:

"Currently, there remains the following individuals who have been indicted in the Southern District of New York and are fugitives from justice and who are known to be directly connected

other records and documents relating to said individuals; stolen explosive materials, and one uzi submachine gun.

At 7:18 p.m. the search warrant was executed and later that night,[11] and the next day, the items previously discovered by agents Ken Moore and Garrett were formally seized and brought to FBI headquarters. In addition, virtually every piece of paper, every book, and everything else in the apartment was also

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with Marilyn Buck.
Alan Berkman
Mutula Shakur
Cheri Laverne Dalton"

[11] An inventory of 21 items was prepared by the FBI entitled: "Significant items located in apartment D, 5714 the Alemeda during the initial search of the premises on the evening of 5/11/85." (J.A. 20). A great number of these items were admittedly discovered earlier by agents Moore and Garrett.

seized.[12]

B. THE OPINION OF THE DISTRICT COURT

As noted by the court of appeals, the district court found that the original entry into the apartment was lawful, but that the so-called "bomb sweep" was unlawful. The district court's legal conclusion about the validity of the original entry into the apartment was based solely upon the pleadings submitted by the parties. Upon the urging of the government, the court denied petitioner's request for an evidentiary hearing on the

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[12] A computer print-out of 77 pages is the most comprehensive inventory of items seized from the two bedroom apartment. This inventory contains thousands of items.

A seventeen page inventory also was prepared by the FBI and attached to the search warrant when returned to the magistrate.

Neither inventory, however, contains a complete list of all the items seized from the apartment.

propriety of the entry.[13] The district court's legal conclusion about the validity of the bomb sweep stemmed from its factual finding that "the overall conduct of the officers render[s] untenable the argument that they acted in accordance with fear for their and others' safety. There is no evidence that anyone was evacuated from the building or warned of the potential danger, or that the agents had otherwise prepared for the risk of an exploding bomb." (J.A. 189).

Accordingly, the district court held that all items discovered by the agents during the illegal bomb search whose evidentiary value was immediately apparent had to be suppressed. In rejecting the

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[13] Appellate review of that aspect of the district court's decision was not yet ripe for review on the government's interlocutory appeal.

government's proposed application of the independent source and inevitable discovery doctrines, Judge Ramsey stated: "In the absence of an explicit mandate by a higher court, I am unwilling to make a ruling in this case that would have the effect of abolishing the Fourth Amendment's warrant requirement and that would 'leave the people's homes secure only in the discretion of police officers." (J.A. 254).

The district court also found that the affidavit on which the warrant was issued established probable cause, aside from any mention of the bomb sweep and discovery of the Uzi. The court therefore concluded that the search and seizure conducted pursuant thereto did not violate petitioner's Fourth Amendment rights.

C. THE OPINION OF THE COURT OF APPEALS

The court of appeals found that the bomb search was unlawful, but that the evidence discovered during this unlawful search was admissible because this same evidence was subsequently rediscovered and seized under a valid search warrant, and, therefore, the inevitable discovery doctrine could be applied to this case. In so holding the court of appeals stated: "The issue is not free from doubt nor is there unanimity in how it should be resolved. . ., but we are persuaded by Merriweather and Moscatiello that unless and until the Supreme Court rules otherwise, the inevitable discovery rule may be applied even though the evidence validly obtained under a search warrant was previously uncovered in an illegal

search." (citations omitted)[14].

The court of appeals also held that the inclusion of the "tainted data in the search warrant affidavit did not invalidate the warrant." 813 F.2d at 649 (App. 14).

REASONS FOR GRANTING THE WRIT

This is a case where over-zealous law enforcement personnel blatantly ignored the Fourth Amendment to the United States Constitution, and for almost two hours illegally searched the entire contents of an apartment and a downstairs storage bin in the apartment building without a warrant. Then, after reporting what they

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[14] United States v. Merriweather, 777 F.2d 503 (9th Cir. 1985) cert. denied, 106 S.Ct. 1497 (1986); United States v. Moscatiello, 771 F.2d 589 (1st Cir. 1985), vacated sub. nom., Carter v. United States, ___U.S.___, 106 S.Ct. 2241 (1986); on remand, 803 F.2d 20 (1st Cir. 1986), cert. granted, sub. nom., United States v. Murray, ___U.S.___, No. 86-995 (1987).

found in the apartment to their superiors, the superiors obtained a search warrant based upon an affidavit that actually referred to some of the incriminating items found during the illegal search.[15]

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15 Although not ruled on below, petitioner has raised the issue that the FBI agents obtained the search warrant based upon an affidavit that was designed, either intentionally or recklessly, to mislead as to:

a. the number of warrantless searches that preceded the application for a warrant, (claiming there was only a protective sweep, when in fact there was also an extensive, 2 hour search of the entire premises);

b. the scope of these warrantless searches, (claiming there was only a cursory protective sweep of the apartment when in fact there was a 2 hour search of every item in the apartment and the storage bin downstairs);

c. the location of where evidentiary items were located during the warrantless search, (claiming that the Uzi was observed in plain view, when, in fact, it was

in a box, in a bag, on a shelf, on top of a closed closet);

d. the extent of evidentiary items discovered during the warrantless searches, (claiming that the agents only observed an Uzi in plain view, when, in fact, an extensive list of items which the government sought to use at trial were also observed during the illegal search);

e. the fact that the searching agents did not locate any explosives in the apartment or the storage bin during their extensive search, (claiming that there still existed probable cause to believe such explosives would be found in the apartment or storage bin if a warrant were issued).

Similarly, the petitioner also challenged the validity of the issuance of the warrant due to the lack of a neutral and detached magistrate. The district court did not specifically rule on the issue, stating:

> I do note however, that evidence presented at the hearing severely weakened the government's independent source argument. Agent Garrett testified to a constant flow of communication

Ultimately, the search warrant was executed, the apartment researched and the items previously discovered during the initial illegal search were re-discovered and seized, this time pursuant to the later obtained warrant. Accordingly, this case involves the ever growing law enforcement procedure of: first illegally

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> between the agents conducting the bomb sweep and those preparing the affidavit for the warrant. Furthermore, Agent Garrett placed Magistrate (sic) at FBI Headquarters with the agents preparing a warrant while these communications by radio were taking place. While this certainly raises a doubt as to the magistrate's detachment and neutrality, that is not the basis for my decision. (J.A. 251).

But see, United States v. Whitehorn, 652 F. Supp. 395 (S.D.N.Y. 1987).

Based upon the United States suggestion and the ultimate granting of petitioner's Motion to Suppress, an evidentiary hearing was not held in regards to either of these challenges to the warrant's validity.

search, then obtain a search warrant and re-search, and claim that the items found during the initial search would have inevitably been found during the search by warrant.

The court of appeals, in its opinion below, acknowledged that the search-illegally-first-obtain a warrant-later law enforcement procedure raises important Constitutional issues whose resolution differs among various counts. (App. 18).

Indeed, on March 9, 1987, this Court granted certiorari in Murray v. United States, No. 86-995 (1987), and Carter v. United States, No. 86-1016 (1987), to answer the precise question presented by this Petition,[16] to wit:

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[16] Petitions for Certiorari are also pending in the following cases raising this precise issue: Salgado v. United States, No.86-1386 (1987); Silvestri v. United States, No. 86-678 (1987).

In holding that the inevitable discovery doctrine could apply to this case, the court of appeals for the fourth circuit relied heavily upon the first circuit's decision in Murray, United States v. Moscatiello, 771 F.2d 589 (1st Cir. 1985), stating:

> ". . . we are persuaded by Merriweather and Moscatiello, that unless and until the Supreme Court rules otherwise, the inevitable discovery rule may be applied even though the evidence validly obtained under a search warrant was previously uncovered in an illegal search . . .

As noted by the petitioners in Murray, the court of appeals decision here ignores the effect that application of the inevitable discovery to this case has upon the Warrant Clause of the Fourth Amendment. See Murray v. United States, Brief for Petitioners at p. 20 n. 13. The court's decision is clearly at odds with

the central demands of the Fourth Amendment, that prior to conducting a search or seizure, law enforcement officers must obtain a warrant.

Moreover, the court of appeals conclusion that where it appears that evidence 'inevitably would have been discovered by lawful means,' the deterrence rationale of the exclusionary rule has 'so little basis' that the rule should not be applied" is patently wrong. Law enforcement officers will have every incentive to follow an unconstitutional course of conduct and to illegally search without warrants if the inevitable discovery doctrine will later permit admission of their discoveries. If they find nothing during the illegal search, they have saved themselves time and trouble. If they do discover

incriminating evidence, they can always put their probable cause to the test at a later time. If it turns out that a magistrate finds that no probable cause justifies issuance of a search warrant, the officers have lost nothing because they would not have been able to enter legally anyway. In such a no-lose situation, officers would be encouraged to conduct pre-warrant searches since any evidence discovered during the illegal search could be used against persons without standing to object even if no warrant is issued. The incentive is to violate the Constitution, not uphold it, under the Fourth Circuit's opinion. As forcefully argued by petitioners in Murray, "that inevitably searches with warrants will be preceded by warrantless searches is a reason for excluding the

evidence illegally discovered, not a reason for admitting it." Brief for Petitioners at p. 14.

In light of the fact that certiorari has been granted in Murray and Carter, and for the arguments set forth in petitioner Murray and Carter's briefs, petitioner Whitehorn asks this Court to either grant her Petition for Certiorari now and consolidate it with Murray, or hold this petition pending the decision in Murray v. United States, and if favorable to Petitioner, to grant this Petition for Certiorari and remand this case to the court of appeals for further consideration.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 86-5524
No. 86-5546

United States of America,

Appellant,

versus

Laura Jane Whitehorn, etc., et al.

Appellees.

On Petition for Rehearing with Suggestion for Rehearing In Banc

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O R D E R

The appellee's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that is should be denied,

IT IS ORDERED that the motion for leave to file the petition for rehearing and suggestion for rehearing in banc is granted.

IT IS FURTHER ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Chief Judge Winter, with the concurrence of Judge Russell. Judge McMillan, United States District Judge, sitting by designation, dissents.

For the Court,

_____

CLERK

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-5524 (L)

United States of America,

Appellant,

versus

Laura Jane Whitehorn,
a/k/a Ann Morrison; Joann
Roth; Milagros H. Matese;
Sharon Lee Scott; Leslie Harris;
Jane Bornter; Patsy McCarthy,

Appellee.

No. 86-5546

United States of America,

Appellant,

versus

Laura Jane Whitehorn,
a/k/a Ann Morrison; Joann
Roth; Milagros H. Matese;
Sharon Lee Scott; Leslie Harris;
Jane Bornter; Patsy McCarthy,

Appellee.

Appeals from the United States District Court for the District of Maryland, at Baltimore. Norman P. Ramsey, District Judge. (CR R-85-0331)

Argued: November 14, 1986 Decided: March 12, 1987

Before WINTER, Chief Judge, RUSSELL, Circuit Judge, and McMILLAN, United States District Judge for the Western District of North Carolina, sitting by designation.

John Granville Douglass, Assistant United States Attorney (Breckinridge L. Willcox, United States Attorney on brief) for Appellant; John Kenneth Zwerling (Michael S. Lieberman; Zwerling, Mark, Ginsberg and Lieberman, P.C.; Marvin D. Miller on brief) for Appellee.

WINTER, Chief Judge:

Defendant, Laura Jane Whitehorn, was indicted for assault, for possession of numerous false identification documents and implements designed for manufacture of false identification, and for possession of an Uzi submachine gun and a silencer. She moved to suppress certain physical evidence, most of which had been discovered during a so-called "bomb sweep" but which was thereafter seized under a search warrant. The district court granted in part and denied in part her motion, but its ruling lacked specificity as to all of the evidence to be suppressed.[1] Thereafter, the trial began,

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[1] The motion was granted with regard to the Uzi submachine gun and denied as to the silencer. The district court stated that the validity of the seizure of other items of evidence could be tested at the time they are offered at trial.

but the district court granted defendant's motion for a mistrial when a dispute arose as to whether certain physical evidence was within the scope of the suppression order. The district court then immediately took additional evidence on the suppression issue. It ruled that everything seen in the bomb sweep and recognized to have evidentiary value was to be suppressed. Under this test, it suppressed the Uzi, two handguns, the silencer, bomb-making components and assembled detonating devices, blank social security cards and a machine for manufacturing false identification. It also indicated that other items might be suppressed depending upon their

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The government later obtained a severance of the count charging possession of the Uzi and filed a notice of appeal from the portion of the district court's order suppressing it.

significance to the agent making the bomb sweep.

The government appeals from both suppression orders, and we reverse and remand for further proceedings.

I.

In a search for fugitives from a 1981 Brinks robbery involving the murder of two police officers, the FBI obtained an arrest warrant for Dr. Alan Berkman and in May 1985 entered an apartment in which several of the fugitives were living. Before entry, the agents were aware that the apartment was occupied by members of a criminal organization associated with several bombings of public buildings, and that some members of the same organization had recently been arrested in possession of a large quantity of dynamite from a stolen shipment, not all of which had been

recovered.

Defendant was in the apartment when the agents entered and she resisted their entry. She refused to open the door even after proper identification of the agents and their purpose. Before they effected forcible entry, the agents heard a rustling and ripping of papers inside the apartment. When the agents successfully forced the door, defendant was standing in the front hall. She refused to move or to identify herself, and an agent forced her to the floor where she was handcuffed. Two other agents made a 4-5 minute search of the apartment. They did not find Dr. Berkman, and they observed no items of evidentiary significance. They removed defendant from the apartment and left it, closing the door behind them. One agent was posted on the landing outside the

apartment to prevent entry by anyone. Steps to obtain a warrant authorizing a search of the premises were undertaken.

Because of the time which had elapsed between the agents' first knock at the door and their entry into the apartment, one of the agents became fearful that defendant may have set an explosive device within the apartment to destroy evidence or injure agents. He therefore radioed for assistance to sweep the apartment for explosives. He did not, however, take the usual precautions of evacuating the building, summoning emergency utility services, notifying the apartment manager, or calling the fire department or a bomb disposal unit, but persons attempting to enter the building were told to remain outside.

In due course, another agent arrived

to perform the bomb sweep. He examined the apartment and a basement storage area for 1 1/2 - 2 hours. While he seized nothing and made no inventory of his findings, he discovered a large suitcase containing equipment necessary for manufacturing photographic identification cards, a large quantity of cash, hundreds of blank social security cards, an Uzi submachine gun, two handguns, one of which was equipped with a silencer, and a blue cabinet containing dozens of assembled but not activated bomb detonating devices. He radioed his findings to the agents who were drafting a search warrant affidavit, and they included in the affidavit a statement that a protective search had taken place and a submachine gun observed.

After the bomb search, nothing having been taken and all objects returned to

their initial place, the apartment was again secured until the search warrant was issued and delivered. The apartment was then searched again and the submachine gun, the handguns and silencer, the cabinet with detonating devices and many other items were seized. Fingerprints of defendant, Dr. Berkman and others were uncovered and the agents found written instructions for manufacturing explosive devices and for using and storing dynamite, as well as documents outlining plans to bomb federal installations in Maryland and Washington and photographs and drawings of two public installations that had been bombed in 1983 and 1984.

II.

As a preliminary matter, we first address defendant's contention that we lack jurisdiction to consider the

government's appeal from the district court's second suppression order. Defendant argues that because the trial began and she was placed in jeopardy, the government lost its right of appeal under 18 U.S.C. Section 3731.

The argument is directly contrary to our holding in United States v. Shears, 762 F.2d 397, 399-400 (4 Cir. 1985). There we held that we had jurisdiction to entertain the government's appeal when the notice of appeal of a pretrial suppression order was filed after the trial began and after defendant's motion for a mistrial was granted. Our rationale was that since defendant's motion for a mistrial was granted, there was no double jeopardy bar to retrial and therefore by the terms of Section 3731, the government had a right to appeal.

III.

The district court found that the original entry into the apartment was lawful but that the bomb sweep was unlawful. Defendant does not now contest the legality of the original entry. The district court's legal conclusion about the validity of the bomb sweep stemmed from its factual finding that "the overall conduct of the officers render[s] untenable the argument that they acted in accordance with fear for their and others' safety. There is no evidence that anyone was evacuated from the building or warned of the potential danger, or that the agents had otherwise prepared for the risk of an exploding bomb." From our review of the record, we think that the district court correctly summarized the evidence on this point, and we are unable to say that

its ultimate factual finding was clearly erroneous.[2]

The district court also found that the affidavit on which the warrant issued established probable cause, aside from any mention of the bomb sweep and discovery of the Uzi. The court therefore concluded that the search and seizure conducted pursuant thereto did not violate defendant's Fourth Amendment rights. We are in agreement. While the fact of the bomb sweep and discovery of the Uzi would not establish probable cause to issue a search warrant because there were not exigent circumstances to make the sweep, the inclusion of the "tainted" data does

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[2] We note that another court evaluating the same incident in connection with the trial of another member of the group also concluded that the bomb sweep was illegal. United States v. Evans, 629 F. Supp. 1544, 1553 (D. Conn. 1986).

not invalidate the warrant.[3] See, e.g. United States v. Spetz, 721 F.2d 1457, 1467-68 (9 Cir. 1983); United States v. Kinney, 638 F.2d 941, 945 (6 Cir.), cert. denied, 452 U.S. 918 (1981); United States v. Agapito, 620 F.2d 324, 338 (2 Cir.), cert. denied, 449 U.S. 834 (1980).

IV.

The question remaining for decision is the effect of discovery of evidence as a result of the illegal bomb sweep when that same evidence is subsequently found and seized under a valid search warrant. The district court correctly ruled that on the authority of Segura v. United States, 468 U.S. 796 (1984), the evidence discovered

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[3] The record contains a memorandum of the magistrate who issued the warrant stating specifically that he would have concluded that the affidavit set forth probable cause for issuance of the warrant even without mention of the bomb sweep and discovery of the Uzi.

for the first time during the search pursuant to the warrant is admissible. But what concerns us is evidence that was first discovered during the illegal search and thereafter rediscovered and seized under a valid search warrant. While the question that faces us was present in the appeal to the Second Circuit which ruled that such evidence was tainted and inadmissible, that aspect of the case was not reviewed by the Supreme Court. The district court in the instant case was of the view that the taint of the first illegal search applied to all evidence discovered in that search and that the taint could not be dissipated by a subsequent search under a valid search warrant. It relied in large part on United States v. Collazo, 732 F.2d 1200 (4 Cir. 1984), cert. denied, 469 U.S. 1105

(1985).

Aside from Segura, the only other relevant Supreme Court ruling on the issue is Nix v. Williams, 467 U.S. 431 (1984), which held generally that unlawfully obtained evidence was nevertheless admissible if it could be established that ultimately or inevitably it would have been discovered by lawful means. Nix was concerned with evidence pertaining to the discovery and condition of a murder victim's body which was actually discovered by interrogation of a defendant in violation of his right to counsel but with respect to which there are ample and compelling evidence to show that search parties were approaching the actual location of the body, that the search would have continued and that the body would inevitably have been found. The

significance of Nix is its recognition and application of the "inevitable discovery" exception to the exclusionary rule barring the use of evidence obtained in violation of constitutional rights.

While the district court concluded that Nix should not be applied to evidence discovered during the first invalid search, we and two other courts of appeals conclude otherwise.[4] See United States v.

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[4] We did not decide the issue in Collazo. There, agents made an illegal search and subsequently obtained defendant's consent to a second search after defendant was told about the incriminating evidence discovered in the illegal search. We held that the consent may have been sufficiently tainted by the illegal search so as to warrant suppression of the evidence obtained in the second search. In short, the taint of the illegal search may have been an operative factor in the giving of consent so that the taint extended to the second search. By contrast, the premise of the inevitable discovery doctrine is that the illegal search played no real part in discovery of incriminating evidence. Only then, if it can be shown that the taint

Merriweather, 777 F.2d 503, 506 (9 Cir. 1985), cert. denied, ____ U.S. ____, 106 S. Ct. 1497 (1986); United States v. Moscatiello, 771 F.2d 589, 603-04 (1 Cir. 1985), vacated on other grounds sub. nom. Carter v. United States, ____ U.S. ____, 106 S. Ct. 2241 (1986). The issue is not free from doubt nor is there unanimity in how it should be resolved, see, e.g., United States v. Sequra, 633 F.2d 411 (2 Cir. 1981), aff'd on other grounds, 468 U.S. 796 (1984); United States v. Pimentel, 626 F. Supp. 1372, 1374 (S.D.N.Y. 1986); People v. Schoondermark, 717 P.2d 504, 506 (Col. App. 1985), but we are persuaded by Merriweather and Moscatiello that unless and until the Supreme Court rules otherwise, the

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did not extend to the second search, would the product of the second search be admissible.

inevitable discovery rule may be applied even though the evidence validly obtained under a search warrant was previously uncovered in an illegal search. Stated otherwise, where it appears that evidence "inevitably would have been discovered by lawful means," the deterrence rationale of the exclusionary rule has "so little basis" that the rule should not be applied. Nix, 467 U.S. at 444.

This conclusion requires us not only to reverse the district court's suppression orders but to remand the case for further proceedings to determine the applicability, if any, of the inevitable discovery rule to the various items of evidence that were suppressed.

REVERSED AND REMANDED

McMillan, District Judge, dissenting:

I would affirm on the facts found and the oral opinion rendered by the District Judge as set out in the Joint Appendix, Vol. II, pages 246-259.